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No. 00-619

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

REGAL CINEMAS, INC.,

Petitioner,

v.

CITY OF MAYFIELD HEIGHTS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE OHIO COURT OF APPEALS, EIGHTH APPELLATE DISTRICT

BRIEF IN OPPOSITION FOR RESPONDENTS CITY OF WESTLAKE AND ITS RESPECTIVE OFFICIALS

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QUESTIONS PRESENTED

Under the First Amendment, is a three-percent municipal admissions tax on patrons of a cinema presumptively invalid, warranting strict scrutiny, when:

(1) the admissions tax does not single out or target First Amendment speakers,

(2) the admissions tax is a generally applicable to admission-charging businesses, and

(3) the admissions tax is content neutral?

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STATEMENT OF THE CASE

Over fifty years ago, Respondent City of Westlake enacted an admissions tax of three percent (3%) on recreational activities conducted within the City. Contrary to the implication of Petitioner, the tax ordinances do not levy a tax on its business. Rather, the tax is paid by the patrons of the recreational establishments, collected by those establishments and remitted to the City.[1] This tax structure is shared by all of the Respondent municipalities — a sales tax on admissions, collected by the selling businesses, and remitted to the municipal government.[2] Despite the fact that Westlake's ordinance requires a vendor to collect the tax from patrons, Petitioner does not do so, but purports to pay the tax out of its general operating revenue. (*Compare* Petition for Writ of Certiorari at 3-4 "petitioner pays the admissions taxes to each of the cities out of its general operating revenues rather than charging its customers for the tax directly" *with* Westlake Ord. § 191.04, found at Petition Appendix 65a "Any person receiving any payment on which a tax is levied

1. Westlake's Ordinance is explicit, imposing a tax "upon every person who pays an admission charge to any place. . . ." (Petition for Writ of Certiorari Appendix at 62a)

2. In fact, similar admissions taxes are levied upon Petitioner's patrons by other suburban Cleveland municipalities; but there are other businesses in those municipalities which generate such taxes; which presumably accounts for the fact that those other suburban municipalities are not a party to this suit. Apparently, either Petitioner's business failure in those neighboring communities, or the success of other recreational establishments, thwarts any claim that these other suburbs' admissions taxes infringe on Petitioner's free speech rights. Not surprisingly, neither the film content nor the price of admission in these other suburban municipalities varies from the theaters within Respondents' borders.

under this chapter *shall collect* the amount of the tax imposed *from the person making the admission payment.*") (emphasis added). The admissions tax ordinance was enacted without specific reference to Petitioner, and Petitioner's patrons are not the only payers of such a tax in Westlake. Admissions to a golf course are also taxed.

In 1994, decades after enactment of Westlake's tax, Regal Cinemas opened a multi-plex theater in the City of Westlake and began collecting and remitting the admissions tax to the City. This new cinema was part of an expansion of Petitioner's business into the four Respondent municipalities; an expansion which was heralded by Petitioner's agents as a municipal revenue boon. In all these cities, Petitioner Regal charges the same admission prices (up to $6.75 per ticket); despite a variation on admission taxes between municipalities.[3]

In Westlake, Regal Cinemas has experienced great success in the past four years. The theater boasts eleven (11) big screens with a total seating capacity of 2,174. The average number of patrons per month is 40,000. In fact, from 1991 through 1996, Petitioner expanded its business in the Respondent municipalities from 8 screens to 49 screens.

3. Petitioner's claim that it pays the tax out of general operating revenue "for competitive reasons" is dubious. (Petition for Writ of Certiorari at 3). At trial, Petitioner's witness admitted that a ticket sale is still profitable even when it voluntarily deducts the admission tax from the ticket price charged. The same witness testified that $7.00 per ticket was the "market barrier" in the Cleveland area. Accordingly, even if Petitioner (as Westlake's Ordinance requires), actually collected the 3 % tax from patrons upon each ticket sale at Petitioner's highest cost ticket of $6.75, Petitioner would still not meet its so-called "market barrier" price of $7.00; and would, of course, increase its profit margin by 3 %.

Due to this expansion, and the market forces which created it, Petitioner Regal Cinemas' patrons have become the largest source of admissions tax revenue in all four Respondent municipalities. This revenue increase, however, has been accompanied by an increased burden on municipal services.

At trial, Petitioner acknowledged that its business generates large numbers of patrons in a concentrated area at concentrated times, resulting in accidents, injuries and incidents creating an increased need for municipal services. In Westlake, the large theatre generates a significant need for the services of the City's Department of Public Safety. The Regal Cinemas in Westlake are in a retail complex known as the Promenade; which includes diverse concerns including large retail stores, restaurants and other recreational and general businesses. The Promenade is approximately 30 acres in size. From January 10, 1995, through August 18, 1998, the Westlake City Police Department received 2,211 calls for police services from Promenade. Of those total number of calls, 328 were calls that were readily identified by the Westlake Police Department as calls for services from Regal Cinemas. In other words, Regal Cinemas, which is 1 of 32 businesses in the Promenade, accounts for 1 in 7 of the Police calls to the Promenade area. It was quite clear from the trial testimony that the sheer number of the Cinemas' patrons, those patrons' age and associated traffic places a greater demand on City services than any single other business in the Promenade and such use clearly demands more City resources than any other single part of the Promenade alone.

Petitioner brought suit against the four Respondent municipalities in the Cuyahoga County, Ohio, Court of Common Pleas; seeking a refund of the remitted taxes and a

declaration that the admissions taxes violated both the First Amendment to the U.S. Constitution and Article I, Section 11 of the Ohio Constitution — a similar free speech guarantee. Following a bench trial, the trial court granted judgment in favor of the Respondent municipalities, and that judgment was affirmed by the Ohio Court of Appeals for the Eighth Appellate District; in a lengthy opinion addressed primarily to First Amendment law as expounded by the federal courts. *Regal Cinemas, Inc. v. City of Mayfield Heights*, 137 Ohio App. 3d 61, 72 (Ohio App. 8th Dist. 2000). The Ohio Supreme Court declined discretionary review. *Regal Cinemas, Inc. v. City of Mayfield Heights*, 89 Ohio St. 3d 1454 (2000).

At trial, it was confirmed that there is absolutely no evidence of censorial intent, of censorial threats, or that the admissions tax has had any effect on the content of Petitioner's films. As the lower court noted: "[Petitioner's] own stipulations refute any suggestion that its freedom of expression has been harmed by the ordinances." *Regal Cinemas, Inc. v. City of Mayfield Heights*, 137 Ohio App. 3d 61, 72 (Ohio App. 8th Dist. 2000), *review denied*, 89 Ohio St. 3d 1454 (2000).

REASONS FOR DENYING THE WRIT

Petitioner argues that a parade of horrible potential dangers warrants a grant of review in this case. The alleged dangers presented by Petitioner, when viewed in light of the factual and procedural background of this case, however, do not withstand scrutiny. This case does not involve a tax which targets the press. This case does not involve differential treatment of certain members of the press. This case involves a content neutral tax on patrons of

recreational amusements — a tax of general application of the type which have long been upheld by the courts. In short, Petitioner complains of an ordinary and reasonable judgment issued by a state court of appeals.

Given the foregoing, it seems clear that the Petition is without merit. This case does not involve an important question of federal law that has not been but should be decided by the Court. Sup. Ct. R. 10(c). This case does not turn on an important federal question which has been decided by a state court of last resort in a manner conflicting with another state court of last resort. Sup. Ct. R. 10(b). Finally, of course, this case does not involve a decision of a United States Court of Appeals which conflicts with a decision of a state court of last resort. Sup. Ct. R. 10(a).

Rather, despite making an as-applied challenge to the taxes at issue, Petitioner seeks to persuade the Court of this case's significance, not because of the facts before it, and not because of the law applied below. Instead, Petitioner argues that this case is significant from a public or constitutional standpoint if there were different facts. Critically, the appellate court observed that "there is no incidental effect on Regal's alleged free speech rights." *Regal Cinemas, Inc. v. City of Mayfield Heights*, 137 Ohio App. 3d 61, 72 (Ohio App. 8th Dist. 2000). At best, Petitioner's case presents not a substantial constitutional question, but a barely colorable claim asserted for parochial, commercial interests. As will become more clear below, in addressing the Petition's assertions, Petitioner essentially armed itself with two misguided California appellate opinions in the vain hope of convincing an Ohio court, contrary to a wealth of precedent elsewhere, that strict scrutiny should be

applied to a content-neutral tax of general application simply because Petitioner moved to, and thrived in, municipalities which enacted that tax.

The Petition pleads for review based upon grand and lofty statements of the purpose and intent of the First Amendment. In the main, Respondent Westlake agrees with Petitioner's statements, as did the courts below. Yes, Petitioner is entitled to First Amendment protection. *Regal Cinemas, Inc. v. City of Mayfield Heights*, 137 Ohio App. 3d 61, 68 (Ohio App. 8th Dist. 2000) ("The First Amendment protects motion pictures as fully as other means of expression."). Yes, a law which targets the press is subject to strict scrutiny, as is a law which governs speech content. *Id.* However, Petitioner is mistaken in the application of these, our most cherished constitutional laws, to the facts of this case — points to which Respondent now turns.

I.

THE OHIO COURTS DID NOT ERROR IN APPLYING INTERMEDIATE SCRUTINY TO A CONTENT NEUTRAL LAW OF GENERAL APPLICATION

The heart of Petitioner's complaint in this matter, and the decisive question considered below is the appropriate level of scrutiny to be applied by the courts. The courts below examined the issue and concluded that the Court's *Minneapolis Star* opinion and related cases did not dictate strict scrutiny, and that intermediate scrutiny was appropriate for a content neutral, generally applicable tax on patrons. This decision was compelled by the facts of the case, as found by the lower courts.

A. STRICT SCRUTINY IS INAPPROPRIATE BECAUSE THE TAXES DO NOT TARGET FIRST AMENDMENT SPEAKERS.

In *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983), the Court considered a very special tax; an ink and paper commodity tax which exempted the first $100,000 of ink and paper consumed in any one year. As the Court noted:

> Minnesota . . . has not chosen to apply its general sales and use tax to newspapers. Instead, it has created a special tax that applies only to certain publications protected by the First Amendment. * * * Further, the ordinary rule in Minnesota, as discussed above, is to tax only the ultimate, or retail, sale rather than the use of components like ink and paper.

Minneapolis Star, 460 U.S. at 581-82. The Court's first amendment inquiry was expressly premised upon this unique tax scheme:

> By creating this special use tax, which, to our knowledge, is without parallel in the State's tax scheme, Minnesota has singled out the press for special treatment. We then must determine whether the First Amendment permits such special treatment.

Minneapolis Star, 460 U.S. at 582. Ultimately, the Court applied strict scrutiny for two reasons — the tax "singled out the press for special treatment" and in addition "targets a small group of newspapers." *Minneapolis Star*, 460 U.S.

at 582, 591. The Court reached the same conclusion, on the same grounds, in *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987), wherein the tax itself was structured to apply to only a few speakers:

> While we indicated in *Minneapolis Star* that a genuinely nondiscriminatory tax on the receipts of newspapers would be constitutionally permissible, 460 U.S. at 586 n.9, 103 S. Ct. at 1372 n.9, the Arkansas sales tax cannot be characterized as nondiscriminatory, because it is not evenly applied to all magazines. To the contrary, the magazine exemption means that only a few Arkansas magazines pay any sales tax; in that respect, it operates in much the same way as did the $100,000 exemption in the Minnesota use tax.

Arkansas Writers' Project, 481 U.S. at 229. *Accord Leathers v. Medlock*, 499 U.S. 439, 446 (1991); *Turner Broadcasting System, Inc. v. Federal Communications Comm'n*, 512 U.S. 622, 659 (1994).

This case, however, has none of these features. The taxes at issue are levied on admissions charged to any "place". (Petition for Writ of Certiorari at 3) The taxes do not "single[ ] out the press for special treatment". *Minneapolis Star*, 460 U.S. at 582. The taxes do not "target[ ] a small group" of speakers. *Minneapolis Star*, 460 U.S. at 591. The taxes are not "structured in a manner that raised suspicions that their objective was, in fact, the suppression of certain ideas." *Turner Broadcasting System, Inc. v. Federal Communications Comm'n*, 512 U.S. 622, 660 (1994). There is simply nothing in the ordinances at issue which

targets either the press or the Petitioner particularly — a fact which this Court has stated is of great importance. In this case, the law at issue does not:

> *inevitably* single out bookstores or others engaged in First Amendment protected activities as did the tax struck down in *Minneapolis Star*. As we noted in *Minneapolis Star*, neither the press nor booksellers may claim special protection from governmental regulations of general applicability simply by virtue of their First Amendment protected activities.

Arcara v. Cloud Books, Inc., 478 U.S. 697, 705 (1986) emphasis added). In fact, the municipal ordinances at issue do not even render Petitioner a taxpayer at all — its patrons are the proper taxpayers.

B. STRICT SCRUTINY IS INAPPROPRIATE BECAUSE THE TAXES ARE ECONOMIC REGULATIONS OF GENERAL APPLICABILITY.

The Court's *Minneapolis Star* opinion expressly noted that: "our cases have consistently recognized that nondiscriminatory taxes on receipts or income of newspapers would be permissible." *Minneapolis Star*, 460 U.S. at 586 n.9. Since the *Minneapolis Star* decision, the Court has had multiple opportunities to readdress this observation; and has wholeheartedly confirmed this to be the First Amendment rule.[4] For instance, in *Leathers v. Medlock*, 499 U.S. 439

4. Notably, the Court's more recent opinions post-date those published state court opinions relied upon by Petitioner as purportedly establishing a nearly uniform rule that municipal (Cont'd)

(1991), the Court was confronted by the cable television industry's objection to the Arkansas sales tax which exempted some media and which had been extended to cable service sales. The Court rejected strict scrutiny because the tax was not content based, because it did "not single out the press" and because "the Arkansas tax has not selected a narrow group" of speakers to pay the tax -- observations which all inhere in the case at bar. *Id.* at 448, 449.

Similarly, in *Jimmy Swaggart Ministries v. Bd. of Equalization of Calif.*, 493 U.S. 378 (1990), the Court confronted a ministry's First Amendment Free Exercise challenge to the application of California's sales and use tax to religious articles. A unanimous Court rejected the challenge:

> California's generally applicable sales and use tax is not a flat tax, represents only a small fraction of any retail sale, and applies neutrally to all retail sales of tangible personal property made in California. California imposes its sales and use tax even if the seller or the purchaser is charitable, religious, nonprofit, or state or local governmental in nature. Thus, the sales and use tax is not a tax on the right to disseminate religious information, ideas or beliefs per se; rather it is a tax on the

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(Cont'd)
admission taxes are unconstitutional. In point of fact, the reasoning utilized by those state court opinions has been criticized not only by the academics, but also by other state courts. *See, e.g., Cox Cable Hampton Roads, Inc. v. City of Norfolk*, 242 Va. 394, 401, 394 S.E.2d 652, 655 (Va. 1991), Willner, *Admissions Tax on Movie Theaters Infringes Freedom of Speech: A Novel Argument that has Worked . . . So Far*, 10 Loy. Ent. L.J. 555 (1990).

> privilege of making retail sales of tangible personal property and on the storage, use, or other consumption of tangible personal property in California. For example, California treats the sale of a Bible by a religious organization just as it would treat the sale of a Bible by a bookstore; as long as both are in-state retail sales of tangible personal property, they are both subject to the tax regardless of the motivation for the sale or the purchase. There is no danger that appellant's religious activity is being singled out for special and burdensome treatment.

Id. at 389. Again, these similar observations can be made in the case at bar.

Petitioner places great emphasis on its "as-applied" challenge, without acknowledging all the facts presented to the courts — not only has there has been no impact on the content of its films, but the tax "represents only a small fraction of any retail sale, and applies neutrally to all retail sales of [admission tickets] made in [the Respondent municipalities]." *Id.* The taxes at issue in this case are plainly analogous to the content neutral, generally applicable sales taxes considered and upheld by this Court in *Leathers* and *Jimmy Swaggart*; a point discussed at length in oral argument before the Ohio Court of Appeals.

C. STRICT SCRUTINY IS INAPPROPRIATE BECAUSE THE TAXES ARE CONTENT NEUTRAL.

Petitioner does not claim that the taxes are applied on the basis of content. *See, e.g., Arkansas Writers' Project*, 481 U.S. at 229 ("a magazine's tax status depends entirely

upon its content.") Rather, Petitioner argues that where a government regulation *could* be used to manipulate content, strict scrutiny is applicable. Of course, the proposition itself proves its fallacy. *All* regulation, tax or otherwise, *could* be used to manipulate content and, arguably speech — there is an "apparently limitless variety of conduct [that] can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *United States v. O'Brien*, 391 U.S. 367, 376 (1968). Of course, all laws regulating conduct are not subject to strict scrutiny.[5]

The question decided by the courts below was whether the generally applicable, minimal taxes in this case, which do not target the press, and which are not based on content, ran afoul of the First Amendment. The answer was obviously in the negative, as this Court's own precedent dictates. The First Amendment:

> does not require the State to grant appellant an exemption from its generally applicable sales and use tax. Although it is of course possible to imagine that a more onerous tax rate, even if generally applicable, might effectively choke off an adherent's religious practices, we face no such situation in this case.

Jimmy Swaggart Ministries v. Bd. of Equalization of Calif., 493 U.S. 378, 392 (1990) (citations omitted). The Court faces no such situation in this case as well. *See Regal Cinemas,*

5. As one court noted: "political assassination is a gesture of political protest too, but no one is disposed to work up any First Amendment enthusiasm for it." *East Hartford Education Ass'n v. Bd of Educ. of the Town of East Hartford*, 562 F.2d 838, 842 (2d Cir. 1977).

Inc. v. City of Mayfield Heights, 137 Ohio App. 3d at 72 ("Regal has grown its business six times over . . . in less than seven years despite the admissions taxes.")

II.

THE ORDINANCES AT ISSUE CLEARLY PASSED INTERMEDIATE SCRUTINY

Petitioner argues that the tax at issue was insufficiently narrow to pass constitutional muster. As it did consistently below, Petitioner uses reasoning and case law applying *strict* scrutiny, which requires least restrictive means, to argue that the municipal taxes in this case are insufficiently precise to pass intermediate scrutiny.[6] While this argument is certainly convenient for Petitioner, it is flatly rejected by law.

As the Court of Appeals noted, intermediate scrutiny does not require a least-restrictive-means analysis. Rather, the inquiry is whether the law "promotes a substantial governmental interest that would be achieved less effectively absent the regulation. *Regal Cinemas, Inc. v. City of Mayfield Heights*, 137 Ohio App. 3d 61, 71 (Ohio App. 8th Dist. 2000) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)). The Court has consistently held this to be the case. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 120 S. Ct. 1382, 1397 (2000) ("least restrictive means analysis is not required."); *Turner Broadcasting System, Inc. v. Federal*

6. Indeed, it appears one could argue that the appropriate level of scrutiny is a rational basis review. *See Regan v. Taxation with Representation Washington*, 461 U.S. 540 (1983); *American Society of Ass'n Executives v. United States*, 23 F. Supp. 2d 64, 70 (D.D.C. 1998), *aff'd*, 195 F.3d 47 (D.C. Cir. 1999), *cert. denied*, __ U.S. __, 120 S. Ct. 1961, 146 L. Ed. 2d 792, 68 U.S.L.W. 3513 (2000).

Communications Comm'n, 512 U.S. 622, 661 (1994) ("a regulation need not be the least speech-restrictive means of advancing the government's interest."); *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989).

Petitioner, again relying on strict scrutiny cases, fatuously argues that raising revenue is not "sufficient . . . to justify" the municipalities' generally applicable tax statutes. (Petition for Writ of Certiorari at 17). Again, the Court has certainly disagreed. Revenue is a "critical" and "important" interest. *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 592 (1983); *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 136 (1992). As the Court of Appeals noted, the recreational admission taxes "raise valuable revenue for traffic, crowd control and security at venues which attract a large number of people in a congested area at the same time." *Regal Cinemas, Inc. v. City of Mayfield Heights*, 137 Ohio App. 3d 61, 70 (Ohio App. 8th Dist. 2000). Petitioner argues that the Respondent municipalities involved should have enacted different taxes to raise revenues, despite the simple fact that the taxes at issue are, *already*, generally applicable, content-neutral regulations. Petitioner is plainly in error.

Intermediate scrutiny forbids a court from second-guessing the legislative authority. A "regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." *Ward v. Rock Against Racism*, 491 U.S. 781, 800 (1989). In other words:

> Regulations that burden speech incidentally or control the time, place and manner of expression must be evaluated in terms of their general effect.

> Nor are such regulations invalid simply because there is some imaginable alternative that might be less burdensome on speech. * * * the validity of regulations does not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests.

United States v. Albertini, 472 U.S. 675, 689 (1985).

What Petitioner fails to acknowledge, or to disclose to this Court, is that scrutiny of the taxes' propriety "requires a balance between the governmental interest and the magnitude of the speech restriction." *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522, 537 (1987). *See also City of Erie v. Pap's A.M.*, 529 U.S. 277, 120 S. Ct. 1382, 1397 (2000); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 79 (1976). In this case, as the Court of Appeals noted, "there is *no* incidental effect on Regal's alleged free speech rights." *Regal Cinemas, Inc. v. City of Mayfield Heights*, 137 Ohio App. 3d 61, 72 (Ohio App. 8th Dist. 2000) (emphasis added). In sum, there is virtually nothing to counterbalance the municipalities' significant interest in raising revenue. As the Court noted in *Leathers*:

> *the government need not exempt speech from a generally applicable tax.*
>
> * * *
>
> Since the members of the legislature necessarily enjoy a familiarity with local conditions which this Court cannot have, the presumption of

> constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes.
>
> * * *
>
> *Taken together, [our cases] establish that differential taxation of speakers, even members of the press, does not implicate the First Amendment. . . .*

Leathers v. Medlock, 499 U.S. 439, 451-453 (1991) (emphasis added). Petitioner's First Amendment claim is insubstantial.

III.

THE COURT OF APPEALS DID NOT IMPROPERLY IMPOSE A BEYOND A REASONABLE DOUBT BURDEN OF PROOF

Petitioner's final complaint is that Cuyahoga County Court of Appeals "obliged [it] to 'prove beyond a reasonable doubt' that the admissions taxes veiled a censorial motive to suppress 'certain ideas'." (Petition for Writ of Certiorari at 19) This is a remarkable allegation; directly belied by the Court of Appeals' own opinion. Petitioner makes several leaps of logic to concoct a perceived error where none exists.

First, Petitioner blandly asserts that it is entitled to a presumption of invalidity because the ordinances at issue were equivalent to content-based regulations of speech, an assertion contradicted both by this Court's own opinions and

by the decisions of the courts below that strict scrutiny was inapplicable. *See Leathers*, 499 U.S. at 451 (absent targeting or content based distinctions, "in the First Amendment context [there is a] strong presumption in favor of duly enacted taxation schemes"). Second, Petitioner asserts that the Ohio opinion created precedent dictating the application of a "beyond a reasonable doubt standard" in First Amendment cases. Again, this is belied by both the law and the Court of Appeals' own opinion. The Court of Appeals directly addressed Petitioner's assignment of error that the trial court "committed prejudicial error when it required Regal to prove beyond a reasonable doubt that the admissions taxes are unconstitutional." *Regal Cinemas, Inc. v. City of Mayfield Heights*, 137 Ohio App. 3d 61, 73 (Ohio App. 8th Dist. 2000). Contrary to Petitioner's assertions, while the Ohio court did reiterate Ohio's common law regarding a presumption of constitutionality, the Court of Appeals certainly did not mandate a "beyond a reasonable doubt standard" for First Amendment cases; and unquestionably did not ignore the Supremacy Clause of the U.S. Constitution.[7] Rather, the Court of Appeals held that, under the evidence:

> the cities' admissions taxes were supported by an important government interest unrelated to the suppression of free expression and they did not

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7. Of course, Ohio courts, including the Court of Appeals which decided this case below, are well-versed in and have not hesitated to apply federal law as the supreme law of the land. *See, e.g., Jenkins v. James B. Day & Co.*, 69 Ohio St. 3d 541 (1994); *Marketing Research Services, Inc. v. Public Utilities Comm'n of Ohio*, 34 Ohio St.3d 52 (1987); *State v. Shirley M.*, 136 Ohio App. 3d 753 (Ohio App. 8th Dist. 2000). Indeed, the Court of Appeals opinion below reads as an homage to federal jurisprudence.

> unnecessarily restrict Regal's alleged free speech rights. *Under any standard of proof, the trial court's findings were supported by the record. Furthermore, this court "is not authorized to reverse a correct judgment merely because erroneous reasons were assigned as a basis thereof." State ex rel. Carter v. Schotten* (1994), 70 Ohio St. 3d 89, 82, 637 N.E. 2d 306; *Myers v. Garson* (1993), 66 Ohio St. 3d 610, 614, 614 N.E. 2d 742.

Regal Cinemas, Inc. v. City of Mayfield Heights, 137 Ohio App. 3d 61, 73-74 (Ohio App. 8th Dist. 2000) (emphasis added).

In light of the above, one should not conclude that the lower courts created any precedent for the application of a beyond a reasonable doubt standard of proof on First Amendment plaintiffs in Ohio. The trial court's unpublished opinion is not controlling authority in any judicial district in the State of Ohio. *See* Ohio Supreme Court Rule for the Reporting of Opinions 3. The appellate court opinion which, as noted above, did not mandate an increased burden of proof, is only considered controlling authority in Cuyahoga County, one of Ohio's eighty-eight counties. *See* Ohio Supreme Court Rule for the Reporting of Opinions 2. Finally, as this Court has indicated, the denial of further appeal generally imports no view on the merits of the lower court's decision. *Brown v. Allen*, 344 U.S. 443 (1953).

In short, Petitioner claims a presumption of unconstitutionality to which it is not entitled, for the purpose of claiming a phantom conflict between the courts of Ohio and those of other states.

CONCLUSION

The case presented to this Court is constitutionally insubstantial both literally and figuratively. Despite the Court's identification of three circumstances in which strict scrutiny is available, despite the fact that none of those circumstances are present in the case at bar, despite the fact that the ordinances at issue are generally applicable economic regulations, and despite the fact that there is absolutely no evidence of an effect on Petitioner's free speech expression, Petitioner continues to claim entitlement to a level of First Amendment review reserved for government censorship. This case presents not a First Amendment claim, but rather a First Amendment pretense, pursued by an entity which "has grown its business six times over" under a general admissions tax of patrons, voluntarily paid by the Petitioner. *Regal Cinemas, Inc. v. City of Mayfield Heights*, 137 Ohio App. 3d 61, 72 (Ohio App. 8th Dist. 2000).

For all of the foregoing reasons, respondent respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

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